**SUPREME COURT OF KENTUCKY**
**CASE NO. 2014-SC-000594-D**



FURLONG DEVELOPMENT CO., LLC and
GORDON STACY
APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT
HON. ROBERT G. JOHNSON
CASE NO. 11-CI-00111

COURT OF APPEALS CASE NOS. 2011-CA-001771 & 2012-CA-001925

GEORGETOWN-SCOTT COUNTY PLANNING
AND ZONING COMMISSION, EGT PROPERTIES, INC.
UNITED BANK AND TRUST COMPANY
APPELLEES

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# BRIEF OF APPELLEES UNITED BANK AND TRUST COMPANY AND EGT PROPERTIES, INC.

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Respectfully submitted,

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## CERTIFICATE PURSUANT TO CIVIL RULE 76.12(6)

The undersigned certifies that a true and accurate copy of the Appellees' Brief was served upon each of the following via U.S. mail, postage prepaid, this 7th day of December, 2015: (1) Jeffrey C. Rager, Rager Law Firm, PLLC, 444 Lewis Hargett Circle, Suite 125, Lexington, KY 40503; (2) Charlie Perkins, 209 East Main Street, Georgetown, KY 40324; (3) Wendell L. Jones, Alber Crafton PSC, 9418 Norton Commons Blvd., Suite 200, Prospect, KY 40059; (4) Clerk, Kentucky Court of Appeals, 360 Democratic Drive, Frankfort, KY 40601; (5) Clerk, Scott Circuit Court, 119 N. Hamilton Street, Georgetown, KY 40324; and (6) Hon. Robert G. Johnson, Scott County Justice Center, 119 N. Hamilton Street, Georgetown, KY 40324. The undersigned has not checked out the record since the matter was transferred to the Kentucky Supreme Court.

COUNSEL FOR APPELLEES

## STATEMENT CONCERNING ORAL ARGUMENT

Appellees United Bank and Trust Company and EGT Properties, Inc. do not believe oral argument is necessary to the resolution of this appeal. This appeal involves the basic task of interpreting unambiguous contractual language, which this Court is well-capable of performing without further argument of counsel.

## COUNTERSTATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

This appeal is the result of a long-standing campaign by a bonding company, Platte River Insurance Company ("Platte River"), to avoid complying with subdivision bonds it issued to the Georgetown-Scott County Planning and Zoning Commission ("Commission"). The bonds were issued by Platte River on behalf of Appellants Furlong Development Company, LLC ("Furlong") and Gordon Stacy (collectively, "Appellants"). The subdivision development failed and, since then, Platte River has steadfastly refused to pay the bond amounts to the Commission. The efforts to avoid paying the bonds include a federal lawsuit filed by Platte River in Kentucky federal court (whose allegations are inconsistent with the claims asserted here) and this lawsuit filed by the Appellants that is now before a third court, has included multiple (now consolidated) appeals by the Appellants and efforts to conduct post-judgment discovery.

When the development began to fail, the Appellants defaulted on their loans to United Bank and Trust Company ("United Bank"),[1] deeded the property to United Bank in order to avoid foreclosure, and failed to complete the bonded improvements. The Commission then called the bonds. As set forth below, the uncontroverted facts and law demonstrate that the terms of the bonds issued by Platte River and the deed executed between the Appellants and United Bank resolve all questions of liability regarding this failed business endeavor. As both the Scott Circuit Court and Court of Appeals held, Platte River is liable to the Commission for the bond proceeds and United Bank did not assume the Appellants' obligations on the bonds.

[1] United Bank and Trust Company and EGT Properties, Inc., which are both subsidiaries of Farmers Capital Bank Corp, are referred to collectively as "United Bank."

On March 15, 2006, Furlong, through its principal Stacy, entered into a loan agreement with United Bank under which United Bank loaned $3,600,000 to purchase and develop property located in Georgetown, Kentucky into a subdivision to be known as the Enclave Subdivision. (Vol I., R. 89). The $3,600,000 loan was to cover all of Furlong's acquisition and development costs, which included the completion of improvements such as sidewalks, public streets, and storm cleanup that were specifically itemized on the budget Furlong submitted to United Bank prior to receiving the loan. (Id.). On December 18, 2006, after work on the subdivision had progressed for several months, Furlong obtained a second loan from United Bank for $775,000. (Id.). The purpose of this loan was to fund additional costs associated with the Enclave Subdivision. (Id.).

In order to develop the property into a subdivision, Furlong had to comply with the Commission's regulations. (Id.). As a condition to obtaining approval of its final subdivision plat, Furlong either had to construct and install certain improvements, such as public streets, or obtain a bond for 125% of the estimated costs of those improvements. (Vol. III, R. 313, 315). Even though Furlong received a loan to fully cover the estimated cost of constructing the improvements, it elected to obtain bonds for the improvements, which allowed Furlong to file the final plat so the lots could be sold. (Vol. I, R. 14-19, 90). The improvements covered by the bonds are sidewalks, handicap ramps, storm cleanup, landscaping, and the final layer of asphalt. (Vol. I, R. 14-19).

On April 26 and June 14, 2007, Furlong obtained the bonds from Platte River. (Vol. I, R. 14-19, 90). The bonds set forth that Furlong, as the principal obligor, and Platte River, as surety "are jointly and severally held and firmly bound unto Georgetown-

Scott County Planning Commission" for "the costs of labor and materials and successful construction, completion and acceptance of all improvements" and that Platte River's and the Appellants' liability on the bonds can only be extinguished if "the Principal shall perform each and every portion of the approved plan...otherwise it shall remain in full force and effect." (Vol. I, R. 14-19).

On May 2 and May 25, 2007, United Bank issued draws to Furlong to pay Platte River for the bond premiums. (Vol. I, R. 90). While loaning money to the Appellants for the premiums, United Bank has never been a party to the bonds in any respect and was not involved in the negotiation or execution of the bonds. In addition to lending the money that paid for the bond premiums, by the time the last draw was made on the $3,600,000 loan, Furlong had met or exceeded its budgeted amounts for completion of the bonded improvements, although Furlong failed to complete the improvements. (Id.).

On or about December 12, 2007, Furlong defaulted on its payment obligations to United Bank. (Vol. I, R. 90, 103). United Bank worked with the Appellants, and the parties decided that instead of foreclosing, United Bank would accept a deed to the property despite the fact that the outstanding debt on the loans exceeded the value of the property. (Vol. I, R. 25, 90). On April 1, 2008, the parties memorialized the property transfer in a Deed and Bill of Sale in Lieu of Foreclosure ("Deed"). (Vol. I, R. 90).

The Deed unambiguously defined the going-forward legal obligations of the parties by expressly stating that United Bank was ***not assuming the "obligations and liabilities of [Furlong] ... under any instruments or agreements with third parties and all such obligations and liabilities remain the responsibility of Furlong***." (Id.). (emphasis added). Moreover, except for releasing the Appellants' deficiency liability

under the loans, "neither the execution, delivery, receipt, acceptance nor recording" of the Deed was "intended to effect a novation, an accord and satisfaction...a waiver, a discharge or release." (Vol I., R. 27). It is unambiguous that the Deed had no effect on Appellants' obligations to third parties, including Platte River and the Commission.

Once the Commission determined that the Appellants had failed to complete the improvements secured by the bonds Platte River issued in the Commission's favor, the Commission notified Platte River it was calling the bonds. (Vol. I, R. 90-91). While the Appellants claim that United Bank breached a duty to the Appellants in contacting the Commission when the Appellants defaulted and quit the project, the Scott Circuit Court held "[t]here is no wrongdoing" and no party provided any law that United Bank breached a duty by contacting the Commission. (Vol. III, R. 368). United Bank was merely protecting its interests in contacting the Commission regarding the bonds.

Subsequently, Platte River filed suit against Furlong and Stacy on December 22, 2008, in the Eastern District of Kentucky, requesting that the court require Furlong and Stacy to reimburse Platte River pursuant to an indemnification agreement between the Appellants and Platte River for Platte River's costs in fulfilling its obligation on the bonds. (Vol. I., R. 91). The Complaint requested that the court require Furlong and Stacy to reimburse Platte River pursuant to an indemnification agreement between them for Platte River's costs incurred in the "***fulfilling of its obligations under the terms of the Subdivision Bonds***." (Vol. II, R. 233) (emphasis added). The Complaint also requested that Furlong and Stacy "honor their obligations" under the indemnification agreement. (Id.) The Complaint thus conceded that Platte River had obligations under the bonds, which is entirely inconsistent with the positions it had taken in this litigation.

On May 28, 2015, notwithstanding the fact that Platte River refused to pay the value of the bonds to the Commission, the Eastern District of Kentucky entered an Agreed Judgment under which the Appellants agreed to be jointly and severally liable to Platte River for $43,359.50, with the court retaining jurisdiction to re-open and amend the judgment "in the event the surety bonds issued by [Platte River] are eventually paid."[2]

On February 2, 2011, apparently in response to the federal lawsuit, Furlong and Stacy instituted this action in the Scott Circuit Court against Platte River, United Bank and the Commission. (Vol. I, R. 5). EGT Properties, Inc., a subsidiary of United Bank's parent company, to which the Enclave Subdivision property was deeded, was also named a defendant. (Vol. I, R. 7). With regard to United Bank, the Appellants' complaint alleged that (1) United Bank's communications with the Commission and the call of the bonds breached the Deed and (2) United Bank would be unjustly enriched if Platte River is required to pay the value of the bonds because the Appellants would then be liable to Platte River pursuant to the indemnification agreement the Appellants executed. (Vol. I, R. 10-11). Platte River filed a cross claim against United Bank and the Commission, requesting the court release the bonds and permanently enjoin the Commission from enforcing them. (Vol. I, R. 73-75).

After filing the lawsuit, the Appellants took no further action to advance their lawsuit, except for answering Platte River's and the Commission's counterclaims.[3] (Vol. I, R. 82, 83-84). Four months later, on June 16, 2011, Platte River served discovery requests on United Bank and the Commission seeking information about irrelevant

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[2] *See* the Eastern District of Kentucky's May 28, 2015 Order in Case: 5:08-cv-00517. This Court can take judicial notice of federal court orders. *See* Doe v. Golden & Walters, PLLC, 173 S.W.3d 260, 265 (Ky. App. 2005).

[3] The Appellants filed a Motion for Pre-trial Conference on June 21, 2011, which was passed generally at the hearing regarding the protective order. (Vol. I, R. 85).

matters occurring ***after*** the bonds were issued and the Deed was executed such as photographs of the development, marketing efforts, offers received, etc. (Vol. II, R. 251-66).

On June 29, 2011, United Bank filed its Motion for Summary Judgment and then, along with the Commission, filed a Joint Motion for Protective Order on July 1, 2011. (Vol. I, R. 86-87, Vol. II, R. 251-55). On June 30, 2011, the Commission filed its own Motion for Summary Judgment. (Vol. II. 229-30). The Appellants did not file a response to the Motion for Protective Order. United Bank explained in its Motion that because the terms of the Deed and the bonds are unambiguous and resolved the disputes among the parties, discovery was not necessary for the Scott Circuit Court to rule on the Motions for Summary Judgment. (Vol. II, 251-55). The court granted the Motion for Protective Order and Hon. Robert G. Johnson ("Judge Johnson") stated that if he reviewed United Bank's and the Commission's Motions for Summary Judgment and determined that discovery was necessary to his ruling, he would inform the parties at the outset of the hearing on the Motions, which was scheduled for August 4, 2011. (VR No. 1: 7/7/11; 11:48:25).

At the August 4, 2011 hearing, Judge Johnson did not indicate that responses to Platte River's discovery requests were necessary to the court's ruling on either Motion for Summary Judgment and proceeded with the hearing. (See generally VR No. 2: 8/4/11). The Appellants did not file an affidavit pursuant to Kentucky Rule of Civil Procedure ("CR") 56.06 indicating that they could not respond to either Motion for Summary judgment without further discovery, but instead filed a response that addressed the merits of the Motions. (Vol. III, R. 335-39).

On August 29, 2011, the Scott Circuit Court granted United Bank's and the Commission's Motions for Summary Judgment ("Summary Judgment Order"), holding that the Appellants "gave up their rights in the property to EGT in exchange for a release by the bank *on their obligations under the two bank notes* and no more. No further discovery will change these facts." (Vol. III, R. 367-68) (emphasis in original). The Summary Judgment Order also found that the "law is clear" that the Commission "had the right to call the bonds." (Vol. III, R. 369). The Summary Judgment Order further held that it could find Platte River's argument that it should not have to honor its commitments because an insufficient amount of work was done on the Enclave Subdivision to "be made in bad faith" and "preposterous." (Vol. III, R. 368).

The procedural events that occurred following the Scott Circuit Court's entry of summary judgment are also important to the resolution of this appeal. On September 27, 2011, the Appellants filed a Notice of Appeal of the Summary Judgment Order. (Vol. III, R. 384). On September 28, 2011, the Appellants filed an Amended Notice of Appeal, which purported to add Platte River as an appellant. (Vol. III, R. 386). Platte River, however, did not participate in the appeal, did not file a brief, and ignored invitations by United Bank and the Court of Appeals to clarify its status in the appeal. For example, when the Appellants sought leave to tender a late prehearing statement, United Bank questioned why Platte River, if they were indeed an appellant, had not filed a timely prehearing statement. *See* Docket Entry 5 in Case No. 2011-CA-001771. In a November 21, 2011 order, the Court of Appeals granted Appellants' motion to tender a late prehearing statement and noted that United Bank's "response raises the issue of whether 'Platte River' has abandoned the appeal. *However, the only two parties named in the*

*notice of appeal are Furlong Development Co., LLC and Gordon Stacy.*" Id. at Docket Entry 7 (emphasis added). Neither Platte River nor the Appellants sought to amend or otherwise address the Court of Appeals' ruling. On August 27, 2012, after briefing was complete at the Court of Appeals, the Appellants filed a "Motion for Relief from Final Judgment" pursuant to Kentucky Rule of Civil Procedure ("CR") 60.02 ("60.02 Motion") requesting the Scott Circuit Court set aside the Summary Judgment Order based upon allegations of "newly discovered evidence." The "evidence" consisted of an affidavit from David Thornton, who was the Appellants' insurance broker in obtaining the bonds from Platte River, regarding alleged conversations he had in 2008 with Michael Easley, a Senior Vice President for United Bank that was involved in the loan negotiations with the Appellants, and an alleged conversation with Ben Krebs, who was an engineer for the Commission. (R. 3-12 in 2012-CA-001925).[4] The Appellants also filed an affidavit from Mr. Stacy regarding his conversation with Mr. Thornton. (*Id.* at 13-14). On October 5, 2012, after briefing and a hearing, the Scott Circuit Court entered an order denying the Appellants' 60.02 Motion. The Appellants then appealed that ruling, which was consolidated with the underlying appeal.

On March 14, 2014, the Court of Appeals affirmed the Scott Circuit Court's Summary Judgment Order, and its order denying the 60.02 Motion, in all respects. The Court of Appeals held that the Appellants' unjust enrichment claim against United Bank was "conclusory," and not a viable claim when, as here, there is "an express contract between the parties defines the circumstances under which an obligation may arise." (Court of Appeals Opinion at 12). The Court of Appeals noted that the Deed "given in

[4] Record citations to the appeal of the CR 60.02 Motion, prior to consolidation, are noted by the "2012-CA-001925" prefix.

lieu of foreclosure, provided that [United Bank] would not be responsible for Furlong's obligations to third parties -- such as the planning commission or Platte River." (Id. at 12). The Court of Appeals held that the Appellants "failed to meet the rigid standards of CR 60.02," because the claimed new evidence "was not material, and it would not have changed the outcome of the proceeding." (Id. at 14). The Court of Appeals also stated that its review was frustrated by irregularities, including the fact that "Platte River did not file a single paper with this court." (Id. at 9-10).

Following the Court of Appeals' ruling, the Appellants filed a motion for rehearing that was denied on September 2, 2014. Docket Entries 56, 65 in Case No. 2011-CA-001771. Platte River, despite not having participated in the appeal, attempted to tender a motion for rehearing. This was denied by the Court of Appeals, as well. Id. at 57, 62. On August 12, 2015, this Court granted discretionary review.

## ARGUMENT

This appeal involves the straightforward application of basic contract principles to unambiguous contract language. The Appellants' Brief veers off course by ignoring the plain language of the contracts they executed and instead relying on immaterial regulations and nonexistent implied conditions that are contradicted by the record in this proceeding. The contracts executed among the parties resolve the disputes regarding this failed business endeavor and prove (1) that summary judgment was appropriately granted on all issues and (2) the 60.02 Motion was correctly denied.

Summary judgment was properly granted because the Appellants would not have been "able to produce evidence at trial warranting a judgment in his favor." Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (citing Steelvest v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991)). The record demonstrates that United

Bank and the Commission satisfied its "initial burden of showing that no genuine issue of material fact exists," and the Appellants failed to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. (citing Steelvest, 807 S.W.2d at 482).

With respect to the 60.02 Motion, the lower courts correctly found that the Appellants failed to meet the burden of proof required for the extraordinary remedy, which requires "some significant defect in the trial proceedings or evidence at trial, . . . such that 'a substantial miscarriage of justice will result from the effect of the final judgment.'" Wine v. Commonwealth, 699 S.W.2d 752, 754 (Ky. App. 1985), quoting Wilson v. Commonwealth, 403 S.W.2d 710, 712 (Ky. 1966). In reviewing the Scott Circuit Court's decision, the "trial court enjoys a great deal of discretion in ruling on matters brought subject to CR 60.02" which will not be disturbed, absent an abuse of that discretion involving arbitrary, unreasonable, unfair, or unsupported conduct or decision making. Richardson v. Head, 236 S.W.3d 17, 20 (Ky. App. 2007); Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

## I. Summary Judgment Was Appropriately Granted Because the Deed and Mutual Release Bar the Appellants' Claims Against United Bank

### *A. The Deed and Mutual Release Executed Between the Appellants and United Bank Are Unambiguous.*

In lieu of foreclosing after the Appellants defaulted on their multi-million dollar loans, United Bank agreed to accept a deed to the property. The terms of the Deed, as well as a Mutual Release that was executed in connection with the property transfer, unambiguously bar the Appellants' claims against United Bank. The interpretation of these contracts is a question of law for the courts to decide. Cantrell Supply, Inc. v. Liberty Mut. Ins., 94 S.W.3d 381, 385 (Ky. App. 2002). The Appellants argue that in

executing the Deed and Mutual Release, United Bank "agree[d] to release Furlong and its sureties for the bonds," and "released Furlong and its surety (Platte River) from any claims the Bank might make on the bonds." Appellants' Brief at 19, 20. The plain language of the Deed and Mutual Release, however, demonstrate that United Bank did not – and had no authority to – release Platte River and Furlong from their obligations to the Commission; only the Commission could grant such relief.

The Deed could not be clearer in explaining that United Bank was ***not*** assuming the "obligations and liabilities of [Furlong] … under any instruments or agreements with third parties ***and all such obligations and liabilities remain the responsibility of [Furlong].***" Vol. I, R. 90 (emphasis added). The Deed further made clear that except for releasing the Appellants' deficiency liability under the loans, "neither the execution, delivery, receipt, acceptance nor recording" of the Deed was "intended to effect a novation, an accord and satisfaction…a waiver, a discharge or release." Vol I., R. 27. It is unambiguous that the Deed had ***no*** effect on the Appellants' obligations to third parties, including the bond obligations involving Platte River and the Commission. The Appellants concede this; admitting in their Brief that the "deed in question did say that [United] Bank was not releasing Furlong's and Stacy's obligation to third parties." Appellants' Brief at 30.

An agreement, such as the Deed, that settles legal claims is a contract that is governed by the rules of contract interpretation. Cantrell Supply, Inc., 94 S.W.3d at 384. A bedrock principle of contract interpretation is that "the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." Id. at 385. The Deed that United Bank and the Appellants executed is not ambiguous. It

clearly set forth that the Deed would not affect the Appellants' obligations under instruments (such as the bonds) with third parties (such as the Commission and Platte River). The Appellants have never claimed that the Deed is ambiguous or that the Scott Circuit Court, which relied on the language of the Deed in granting summary judgment, interpreted the Deed incorrectly.

Because the unequivocal language in the Deed resolves all questions regarding United Bank's obligations regarding the bonds as a result of the property transfer, the Scott Circuit Court correctly rejected the Appellants' contention that additional discovery was necessary. Vol. III, R. 368. During the hearing in which the court entered the Protective Order that allowed United Bank and the Commission to delay answering Platte River's discovery requests, Judge Johnson stated that he would not rule on the Motions if he reviewed them and found that further discovery was required:

> I want to make it clear, I think I tried to at the beginning, that what may happen on August the fourth is that I may say, well, now you need to answer the discovery, and I am not going to rule on your summary judgment motion until they have had a chance to do that and get that information. And so it may end up, and allow you all to do further discovery if necessary, before I rule on the summary judgment motion.

VR No. 1: 7/7/11; 11:48:25. At the August 4, 2011 hearing, the court determined that discovery was not necessary and the parties instead fully argued the merits of the Motions for Summary Judgment. *See generally* VR No. 2: 8/4/11. Following the hearing, the Scott Circuit Court construed the plain language of the Deed and granted summary judgment and expressly finding no further discovery could change the terms of the Deed. Vol. III, R. 368.

Furthermore, United Bank could not release or assume the Appellants' obligations under the bonds even if it wanted to. Kentucky law is clear that in order for one party to assume an obligation of another (here, the obligors are Platte River and Furlong), the party to whom the obligation is owed (here, the obligee is the Commission) must assent to the transaction, because in the absence of the obligee's assent, the obligee would be divested of its claim against the obligor. North Western Mut. Life Ins. Co. v. Eddleman, 56 S.W.2d 561, 562 (Ky. 1932). This process, known as novation, is the only means by which United Bank could have assumed the Appellants' or Platte River's obligations with regard to the bonds. The record is undisputed that the Commission has not assented to a novation. Moreover, the Deed speaks directly to this issue: "neither the execution, delivery, receipt, acceptance nor recording" of the Deed was "intended to effect a novation...or release." Vol I., R. 27.

If United Bank somehow released the Appellants and Platte River from their obligations to the Commission under the bonds by accepting the property, would the transfer have not likewise released the Appellants from their indemnity agreement with Platte River? Neither Platte River, who filed a lawsuit against the Appellants pursuant to the indemnity agreement, nor the Appellants, who base their claims against United Bank on their obligations to Platte River under the indemnity agreement, has made such claims. By the Appellants' same logic, the transfer of the property would also have released the Appellants from their obligations to taxing authorities, subcontractors, etc. Obviously such a result is not logical. In addition to failing under contract law, the Appellants ask this Court to accept their argument in a piecemeal fashion by applying it only in a manner that helps their claims.

The Appellants also argue that the Mutual Release, which was executed by United Bank and the Appellants contemporaneously with the property transfer, "release[d] Furlong and its sureties for the bonds." Appellants' Brief at 19. As with the Deed, this argument is contradicted by the plain language of the Mutual Release. The language to which the Appellants refer states: "The Obligated Parties [the Appellants] and Lender [United Bank], each hereby for itself...[and] sureties...shall be deemed to have forever released...the other, and its...sureties...arising out of, or by reason, in connection with, or in any way ***related to the Loan Documents and the Loans***, except that the Obligated Parties are not released from any representation or warranty set forth in the Deeds..." Vol. I., R. 33 (emphasis added).

The Mutual Release is clear that United Bank and the Appellants released their claims only with respect to the Loan Documents and Loans, which were the only contracts between United Bank and the Appellants. Moreover, the Mutual Release expressly stated that the representations in the Deed remain in effect and, as discussed, the Deed states that the Appellants remain liable for their obligations to third parties. As with the Deed, absent a novation (which has not occurred), it is impossible for United Bank to have released the Appellants and/or Platte River from their obligations to the Commission. Because of this clear language, the Scott Circuit Court held that that the Appellants "gave up their rights in the property to EGT in exchange for a release by the bank *on their obligations under the two bank notes* and no more." Vol. III, R. 368 (emphasis in original).

The Scott Circuit Court's interpretation of the Deed and Mutual Release is correct, as well as logical. The Mutual Release contained standard language that released

the Appellants and their agents, such as sureties, from the Appellants' default of the Loan Documents. The mention of sureties in the standard release language would only have applicability if the Appellants had posted a bond in favor of United Bank to guarantee the loans. That did not occur. In sum, neither the Deed nor the Mutual Release relieved (nor could have relieved) Platte River or the Appellants of their liability to the Commission under the bonds.

### *B. The Appellants' Unjust Enrichment Claim Fails as a Matter of Law*

The Appellants' unjust enrichment claim is based on the theory that United Bank breached the Mutual Release by informing the Commission that the Appellants failed to complete the bonded improvements, which caused the Commission to call the bonds. Appellants Brief at 20-22. The Appellants argue that United Bank's position "is clearly a breach of the mutual release." Id. at 21. As explained above, the Mutual Release released the Appellants only from the Appellants' deficiency liabilities under their loan agreements with United Bank; it had no impact on any obligation owed by the Appellants or Platte River to the Commission. To this point, the Mutual Release made clear that it had no effect on the representations in the Deed, which unambiguously set forth that United Bank was not assuming the Appellants' obligations to third parties. As such, the factual premise of the Appellants' unjust enrichment claim is simply wrong.

The legal premise of the Appellants' unjust enrichment claim is similarly wrong. As the Court of Appeals recognized, under Kentucky law unjust enrichment is not a viable claim when an express contract between the parties defines the circumstances under which an obligation may arise with reference to a certain subject matter. Sparks Milling Co. v. Powell, 143 S.W.2d 75, 76 (Ky. 1940). The Deed is an express contract

between United Bank and the Appellants that clearly identified the circumstances under which United Bank would be responsible for certain aspects of the Enclave Subdivision. More importantly, the Deed identified aspects for which United Bank would ***not*** be responsible, which explicitly included the Appellants' obligations to third parties, such as Platte River and the Commission. The existence of an express contract addressing the specific subject matter of the present dispute forecloses, as a matter of law, the Appellants' unjust enrichment claim.

Even if the Appellants' unjust enrichment claim was not foreclosed as a matter of law, the undisputed facts demonstrate that the Appellants cannot satisfy the three elements of unjust enrichment: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value. Jones v. Sparks, 297 S.W.3d 73, 78 (Ky. App. 2009). Unjust enrichment is "a basis of restitution to prevent one person from keeping money or benefits belonging to another." Haeberle v. St. Paul Fire and Marine Ins. Co., 769 S.W.2d 64, 67 (Ky. App. 1989). The Appellants cannot satisfy any of these elements. It is undisputed that when the Appellants sought to obtain a loan from United Bank, they submitted an itemized budget of their expected costs, including the construction of sidewalks, public streets and storm cleanup costs – the very items that are bonded. Vol. I, R. 89. It is also undisputed that the Appellants received draws that should have been used to construct these items. Vol. I, R. 90. Finally, it is undisputed that the Appellants received draws to pay Platte River for the bond premiums. Id.

United Bank has loaned money to fully construct the bonded improvements ***and*** paid for the bond premiums to Platte River. The Appellants' theory would require

United Bank to fund the entire construction costs associated with the bonded improvements ***again***, even after having loaned money for the improvements in the first place and paid for the bond premiums to insure those improvements were completed. Moreover, the Deed expressly states that the Appellants acknowledge "that the fair market value of the real property and the assets being conveyed hereby is less than the outstanding principal amount of and interest accrued on the foregoing obligations." This shows that United Bank suffered a monetary loss because of the Appellants' default; in no way has United Bank been unjustly enriched. Vol. I., R. 97. Its loans were defaulted upon and it received property worth less than the balance of the loans. Neither the express terms of the Deed nor equity supports the untenable position the Appellants have advanced.

## II. Summary Judgment Was Appropriately Granted Because the Terms of the Bonds Make Clear that Platte River Is Liable to the Commission

### *A. The Bonds Executed Between the Appellants, Platte River, and the Commission Are Unambiguous.*

Because the Deed resolves all questions regarding United Bank's liability with respect to the bonds, the remaining issue is whether Platte River is liable to the Commission for the bonds. The bonds make clear that the only means by which Platte River's and the Appellants' joint and several liability to the Commission can be extinguished is the completion of the bonded improvements. The bonds unambiguously state that Furlong, as principal, and Platte River, as surety, "are jointly and severally held and firmly bound unto Georgetown-Scott County Planning and Zoning Commission," for the "costs of labor and materials and successful construction, completion and acceptance of all improvements" identified in the bonds. Vol. I., R. 14-19. The duration and parameters of this obligation are clearly defined: "the condition of this obligation is such

that if the Principal shall perform each and every portion of the approved plan, then this obligation shall be null and void; ***otherwise it shall remain in full force and effect***. Vol. I, R. 14 (emphasis added). Thus, from the date of execution, Platte River and the Appellants were bound to the Commission until the improvements identified in the bonds were completed by the Appellants or paid for by Platte River. It is undisputed that the Appellants did not construct the bonded improvements and Platte River refuses to pay the value of the bonds.

The Court of Appeals recently reaffirmed that a "bond agreement is a contract and the parties to the contract are free to agree upon its terms and conditions," in a case in which the court rejected a party's attempt to "avoid the unequivocal language of the bond." Five Star Lodging, Inc. v. George Constr., LLC, 344 S.W.3d 119, 123-24 (Ky. App. 2010). In the present case, the Appellants, Platte River, and the Commission agreed upon terms and conditions in the bonds, none of which have been alleged to be ambiguous. As with the Deed, "the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." Cantrell Supply, Inc., 94 S.W.3d at 385.

**B. *The Commission's Regulations Are Not Implied Conditions.***

The Appellants urge this Court to ignore the plain language of the bonds by arguing that neither Platte River nor the Appellants were bound to the Commission under the bonds at the time the Appellants walked away from the development. The Appellants argue that the bonds had not "matured," because "there was an implied condition of 80% of the homes on the Enclave to be built before work covered by the bonds was to be performed." Appellants' Brief at 10.

The Appellants premise their "80% condition" argument on a Commission ***design standard*** for temporary construction roads that are to be dedicated to the city after final completion. The design standard has nothing to do with surety bonds and does not alter the obligations of parties to such bonds. The design standard, which is sandwiched in the regulations between ambient air temperatures for placing asphalt and the maximum length of cul-de-sacs, states:

> Any proposed roadway to be dedicated to the City of Georgetown for maintenance can apply final inch of asphalt surface after 80 percent of the lots that are served by the roadway has received Certificate of Occupancy. Roads to be dedicated to Scott County are subject to the *Street Design and Specifications* adopted by the Fiscal Court on October 24, 1994.

Vol. III, R. 332-33. The design standard's language demonstrates that it pertains to the timing of the completion of roads that are planned to be dedicated to the city—it is irrelevant to the bonding process.

Equity likewise does not support the Appellants' position. The Appellants ask this Court to accept the argument that unless nearly all of the homes in the subdivision are constructed when a developer abandons the project, the developer's and surety's obligations never existed. It is illogical to relieve the developer and surety from their obligations simply because the developer failed to perform earlier, rather than later.

Under the Appellants' theory, as long as they stayed below this 80% threshold on construction, they could escape their obligations under the bonds. The Appellants do not identify a legitimate rationale for this threshold because there is none. Why should a developer be allowed to construct and sell 79% of the houses in a development (depending on the size of the development, this could equate to hundreds of homes) and then quit the project and be relieved of the obligation to complete the roads, sidewalks,

landscaping, handicap ramps, and storm cleanup? And why should the company that bonded that work be allowed to escape its obligations to pay for incomplete public infrastructure? The Appellants' theory leads to absurd and disastrous results.

To be sure, this is not a case where no work was done before the developer quit the project; the Appellants' Brief admits that the property had been developed "to the point where houses could be built." Appellants' Brief at 2. The bonds are clear; the only means by which Platte River's and the Appellants' liability under the bonds can be extinguished is if Furlong performed its obligations with regard to the bonded improvements. It did not. Thus, the obligations remain and the bonds were properly called by the Commission.

### C. *Factually Dissimilar Authority from Other Jurisdictions Cannot Alter the Plain Language of the Bonds.*

The Appellants seek to avoid the plain language of the bonds not only by alleging the bonds have implied conditions, but also by relying on cases from other jurisdictions, even though those cases are factually dissimilar. See Appellants' Brief at 12-15. While authority from other states is not necessary to resolve the disputes in this appeal, it should be noted that several other jurisdictions have affirmed the contractual right of regulatory bodies to call bonds based on strikingly similar facts.

For example, in City of Merced v. American Motorists Ins. Co., 126 Cal.App.4th 1316, 1318-19 (2005), a developer, Grant Homes, Inc. ("Grant"), entered into a subdivision agreement with the city. Grant agreed to obtain a performance bond from AMIC for certain of the work, including pump stations and paving. Id. at 1319. While Grant was constructing the improvements, it became insolvent and a bank took title to the property. Id. at 1320. The bank then sold the property to Wu. Id. Before purchasing

the property, Wu discussed the bonds with the city and the city stated it would make demands on the bonds issued by AMIC and would use its efforts to obtain the bond proceeds, which it would pay to Wu to defray his costs in completing Grant's obligations. Id. The city then demanded payment from AMIC on the bond. Id. at 1320-21.

The Merced court rejected AMIC's argument that the city's agreement with Wu affected AMIC's liability and required AMIC to remit the costs of the uncompleted work. Id. at 1324. The court noted that the measure of damages are the value of the unfulfilled right, which is the cost of bringing the subdivision into compliance by installing the bargained-for improvements and that the damages exist even if the public entity has not actually completed the improvements. Id. at 1323.

The same decision was reached in Virginia when a developer became insolvent and failed to complete its bonded improvements. Bd. of Supervisors of Stafford County v. Safeco Ins. Co. of America, 310 S.E.2d 445 (Va. 1983). As in Merced, the Supreme Court of Virginia held that the evidence "showed that the performance bonds were properly executed, that the principal failed to fulfill its bonded obligations, that proper notice of default and demand for payment was given to the surety." Id. at 448. The court required the surety to comply with its bonds, holding that "[i]t was unnecessary for the County to prove a financial loss as a prerequisite to recover from Safeco [the surety]. A performance bond is intended to guarantee completion of the improvements it covers. Thus, the obligee of such a bond need not incur any expense or do any work on the improvements before collecting on the bond." Id. at 448-49. The court affirmed the basic contract law at issue in holding that the surety "voluntarily entered into a

contractual relationship based upon the implicit assumption that the project was feasible, and … it will be held to its contractual obligation as a professional surety." Id.

In contrast, the two cases cited by the Appellants from other jurisdictions were decided on the basis that work had not yet begun on the developments. In County of Yuba v. Central Valley National Bank, 20 Cal.App.3d 109 (1971), the court only permitted the bank to escape its letter of credit obligations because the work had not yet begun and the instrument of credit executed by the bank indicated that the security only covered improvements whose construction had already begun. Similarly, in Westchester Fire Ins. Co. v. City of Brooksville, 731 F. Supp. 2d 1298 (M.S. Fla. 2010), work had not yet begun on the phase of the project for which the bonds were issued. These cases, which were decided on this factual issue, have no bearing on the present dispute. The Appellants and Platte River relied heavily on Yuba and Westchester before the courts below. The Scott Circuit Court's found that Platte River's arguments "preposterous because clearly a great deal of work had been performed by Furlong to get the subdivision ready for lots to be sold." Vol. III, R. 368. The Appellants concede this is true. Appellants' Brief at 2.

**D.** ***The Bonds Do Not Have to Be Replaced***

The Appellants claim that because they transferred the property, new bonds were required to be posted by United Bank. In support, the Appellants argue "[t]his is not a case where Furlong simply walked away from the project and gave the property back to the lender." Appellants' Brief at 17. To the contrary, that is ***exactly*** what happened as evidenced by the Deed in Lieu of Foreclosure. The Appellants apparently base this false statement on the fact that the property was deeded to EGT Properties, Inc., a subsidiary of

United Bank. But this is of no significance—the Appellants' own complaint repeatedly acknowledged that that the property was knowingly transferred by them to a wholly-owned subsidiary of United Bank's parent company. Vol. I., R. 7, 9. Nor is there anything unusual in having a subsidiary of the Bank, rather than the Bank itself, hold title to the property.[5]

The Appellants' false premise finds no support in the law, either. The Appellants do not cite any Commission regulation (or any other authority) that (1) extinguishes a surety's bond obligations when property is transferred; or (2) requires a new bond to be posted with the Commission when property is transferred. Both would be necessary in order for the Appellants' claim to succeed. For good reason, neither regulation exists. If a surety and its principal were released from their bond obligations simply because the property was transferred—whether it be to avoid foreclosure like this case, or for any other reason—the *only* scenario under which the surety and principal would be required to fulfill their contractual obligation would be if the developer failed to complete the bonded improvements but held on to the property. As with the Appellants' other arguments, this contention conflicts with the plain language of the bonds and, if accepted, would deprive the Commission of the security it obtained.

## III. The Appellants' Standing Arguments Mischaracterize the Court of Appeals' Ruling

The Appellants claim that "the Court of Appeals based its ruling on an assumption that Platte River did not want to pursue an appeal and that Furlong and Stacy

[5] The $4 million transfer that Furlong repeatedly refers to between the bank subsidiaries involved transferring the value of the property established in the Deed from one subsidiary to another. Nor is it unusual or wrong that the mortgage remained with the property. This was intended to protect United Bank primarily against potential competing liens. United Bank has not and will not profit from the Appellants' default; indeed, the Deed acknowledged that United Bank suffered great financial loss. Vol. I., R. 97.

did not have standing to prosecute an appeal." Appellants' Brief at 23. The Appellants argue that the Court of Appeals ran afoul of Harrison v. Leach, 323 S.W.3d 702 (Ky. 2010), which holds that an appellate court cannot dismiss an appeal on its own motion for lack of standing if a lack of standing was not raised by a party.

The Harrison decision has no bearing on this case, because the Court of Appeals did not dismiss this appeal due to standing; to the contrary, it ruled on the substantive merits of the Appellants' unjust enrichment, declaratory judgment, and CR 60.02 claims:

> [Movants' unjust enrichment claim is] merely conclusory and ***fails to sustain their burden of proving their case***...Furlong's deed, given in lieu of foreclosure, provided that the bank would not be responsible for Furlong's obligations to third parties – such as the planning commission or Platte River...Thus, ***the unjust enrichment claims asserted by Furlong and Stacy are foreclosed as a matter of law***...[Regarding the denial of Appellants' Motion for Relief from Judgment], "[t]he 'newly discovered evidence" claimed by Furlong and Stacy ***failed to meet the rigid standards of CR 60.02***. It was not material, and would not have changed the outcome of the proceeding. ***The trial court did not abuse its discretion by denying the motion for relief***. (Court of Appeals Opinion at 12-14) (emphasis added).

The Court of Appeals' reference to the Appellants' standing and frustration with Platte River's failure to participate in the appeal does not violate this Court's finding in Harrison. While the Appellants claim the decision bars courts from "interject[ing] standing into an appeal when the benefitting party did not raise the defense in the court below," the Appellants' Brief admits that United Bank raised standing as a defense at the Court of Appeals. Appellants' Brief at 22, 25. In fact, "**The Appellants Lack Standing With Regard to the Protective Order**" was a bolded section in United Bank's brief in the Court of Appeals. Moreover, the Appellants responded to United Bank's arguments

regarding standing in their reply brief. (United Bank's July 16, 2012 Brief at 16-17; Appellants' July 30, 2012 Brief at 4-5.)

The Appellants make much of the fact that United Bank did not raise standing as an affirmative defense in its answer at the Scott Circuit Court. At that time, however, standing was not an issue. Platte River was an active defendant in the Scott Circuit Court. It was only after the Scott Circuit Court's Summary Judgment Order's noted that it could have found Platte River's arguments to "be made in bad faith" that Platte River stopped participating in the action. Vol. III, R. 368. Standing only became an issue when Platte River failed to participate in the appeal and the Appellants attempted to make arguments that belong to Platte River regarding discovery and what obligations Platte River has to the Commission.

This Court stated in Harrison that because:

> a defendant benefits from early termination of a case due to a plaintiffs lack of standing, we believe a defendant should not be permitted to stand mute at the trial court level regarding standing, only to raise the issue on appeal (or, as in this case, continue to ignore the issue but ultimately benefit from an appellate court's raising it on its own).

Harrison, 323 S.W.3d at 708-09. The standing issue raised by the Court of Appeals questioned whether Platte River should have brought the appeal (while also addressing the merits of the dispute). If this Court were to find that the Court of Appeals improperly considered standing it is *Platte River*—the very party who stood mute at the Court of Appeals and made "preposterous" arguments at the Scott Circuit Court—that would benefit if the Court of Appeals' decision is reversed.

## IV. The Scott Circuit Court Did Not Abuse Its Discretion in Denying the Appellants' CR 60.02 Motions

Almost a year after the Summary Judgment Order was entered, the Appellants asked the Scott Circuit Court to set aside the ruling based on allegations of "newly discovered evidence." The "evidence" consisted of an affidavit from David Thornton, who was the Appellants' insurance broker in obtaining the bonds from Platte River regarding alleged conversations he had in 2008 with Michael Easley, a Senior Vice President for United Bank that was involved in the loan negotiations with the Appellants, and an alleged conversation with Ben Krebs, who was an engineer for the Commission. The Appellants also filed an affidavit from Mr. Stacy regarding his July 2012 conversation with Mr. Thornton.

The Scott Circuit Court did not abuse its discretion in denying the CR 60.02 Motion. Richardson v. Head, 236 S.W.3d 17, 20 (Ky. App. 2007). In order for "newly discovered evidence" to warrant setting aside a judgment, the movant must satisfy each of these five factors: (1) the evidence, if introduced, would probably result in a different outcome; (2) the newly discovered evidence is material; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the evidence was discovered after entry of judgment; and (5) the moving party was diligent in discovering the new evidence. Hopkins v. Ratliff, 957 S.W.2d 300, 301-02 (Ky. App. 1997). The Court of Appeals has described satisfying these factors as "major hurdles." Richardson v. Head, 236 S.W.3d at 20.

Beginning with the first factor, the Court of Appeals correctly held that the Appellants' evidence "would not have changed the outcome of the proceeding." Court of Appeals Opinion at 14. The Appellants' alleged conversations, even if true, would not

have changed the outcome of this case because the Scott Circuit Court granted summary judgment based upon the unambiguous language of the contracts at issue, which are the Deed and the bonds. Extrinsic evidence, such as these purported conversations, cannot alter the terms of the contracts. Cantrell Supply, Inc. v. Liberty Mut. Ins., 94 S.W.3d 381, 385 (Ky. App. 2002).

As to the second factor, the Court of Appeals also found the Appellants' new "evidence" was not material. Court of Appeals Opinion at 14. Mr. Thornton's affidavit is classic parol evidence and cannot vary the terms of the bonds or the Deed. Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343, 345 (Ky. 1970). Even if Mr. Thornton's affidavit accurately reflected the conversations he had with Mr. Krebs and Mr. Easley (which Mr. Easley disputed), these statements were made well after the bonds and the Deed were executed by the parties. The parol evidence rule prevents such oral statements from being considered because the rule is "a substantive rule of law that prevents the introduction of oral statements into evidence to alter a written agreement, per force lending integrity to writings." Radioshack Corp. v. ComSmart, Inc., 222 S.W.3d 256, 261 (Ky. App. 2007). Because a substantive rule of law prevents these oral statements from being considered, they cannot be considered material.

The third factor, which requires that the evidence not be merely cumulative, likewise fails. Even if Mr. Krebs told Mr. Thornton that the bonds could be released if another surety was in place, it does not change: (1) the Commission's right to call the bonds, (2) the Commission's right to hold the Appellants and Platte River, as obligor and surety, responsible for the bonds, or (3) the Commission's practice of calling bonds when a developer abandons a project and is unable to perform its bonded obligations. VR No.

2: 8/4/11; 19:28. In addition, the Deed makes clear that United Bank did not assume the responsibility of replacing the Appellants' security.

These alleged statements cannot constitute "newly discovered evidence" because these allegations were included in the Appellants' ***Complaint***. Vol. I, R. 46-49. The alleged "evidence" involves arguments regarding whether the bonds would be released or replaced. These arguments are, by definition, cumulative because the Appellants have made them at every court below.

Finally, as to the last factor, Mr. Thornton's affidavit should have been discovered with diligence by the Appellants prior to entry of summary judgment. In order to prove that the evidence was not properly discovered until after judgment, the movant must "allege or ... establish by affidavit or other proof that he could not with reasonable diligence have discovered the evidence which he now claims is material to his case in time to introduce it." Meeks v. Ellis, 7 S.W.3d 391, 393 (Ky. App. 1999).

The Appellants were certainly aware that Mr. Thornton was their insurance broker and agent in obtaining bonds from Platte River long before the Complaint was filed. The alleged conversations between Mr. Thornton and a United Bank representative took place three years before the complaint was filed. Because the Appellants' Motion made no attempt to explain why the Appellants could not have contacted their insurance broker prior to the entry of summary judgment, Mr. Thornton's affidavit does not constitute "newly discovered evidence."

## V. Discovery Could Not Have Changed the Summary Judgment Order

### A. *The Appellants Lack Standing With Regard to the Protective Order.*

First, no discovery was necessary in this case because the disputes are resolved by the court's interpretation of unambiguous contracts and no amount of discovery will vary

the plain language. Vol. III, R. 368 (Furlong "gave up their rights in the property to EGT in exchange for a release by the bank *on their obligations under the two bank notes* and no more. No further discovery will change these facts.") (emphasis in original).

Second, the Appellants made no attempt to serve or conduct any discovery in this case in the seven months between the filing of the complaint and entry of summary judgment. Moreover, the Appellants did even not file a response objecting to United Bank's Motion for a Protective Order relating to Platte River's discovery requests. Despite not taking any discovery on their own, the Appellants now argue they were "unfairly restricted from pursuing evidence to prove the theories" of their case. Appellants Brief at p. 32. This is simply wrong.

It is well-settled that in order to have standing to appeal an issue, the party asserting standing must have more than a "mere expectancy" in the outcome of the proceeding but must have a "present and substantial interest." Plaza B.V. v. Stephens, 913 S.W.2d 319, 322 (Ky. 1996). It was Platte River that issued the discovery requests; Platte River, who elected not to participate in the appeals of this dispute, is the only party with a substantial interest in the protective order.

The Appellants also complain that although the Scott Circuit Court granted their motion to join a new defendant, EKT Properties, Inc. (a subsidiary of United Bank to whom the property was later transferred) to the lawsuit, the Appellants "were not given the opportunity to follow through on the Order granting leave to amend their Complaint to join EKT Properties" before summary judgment was granted. Appellants' Brief at 35. The Scott Circuit Court granted the Appellants' motion during a July 7, 2011 hearing. Summary judgment was not entered until nearly ***two months later*** on August 29, 2011.

*See* VR No. 1: 7/7/11. It is not the Scott Circuit Court's fault that the Appellants made no attempt to amend their Complaint for nearly two months, despite having granted them leave to do so.

Third, the cases cited by the Appellants do not support the contention that summary judgment cannot be granted unless discovery has taken place. Instead, the cases state that a party should be given the ***opportunity*** to conduct discovery. See Pendleton Bros. Vending v. Comm. Finance & Admin., 758 S.W.2d 24, 29 (Ky. 1988). The Hartford decision cited by the Appellants clearly elucidates this distinction:

> It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so. Here, Hartford had a period of some six months between the filing of the complaint and the date of summary judgment in which to engage in discovery, or to inform the court, pursuant to CR 56.06, why judgment should not be entered or why a ruling on the motion for summary judgment should be continued. The record contains no affidavit pursuant to CR 56.06.

Hartford Ins. Group v. Citizens Fidelity Bank & Trust, 579 S.W.2d 628 (Ky. App. 1979). The Appellants in this case – like those in Hartford – had the opportunity but never even attempted to conduct discovery and cannot now be heard to complain about their failure to do so.

### B. *The Appellants Did Not File an Affidavit Stating that Discovery Was Necessary to Respond to the Motion for Summary Judgment.*

When served with a summary judgment motion, the responding party, in order to defeat the motion, must produce contradictory evidence or tender an affidavit providing reasons why additional discovery is necessary to respond to the motion. Hayes v. Rodgers, 447 S.W.2d 597, 601 (Ky. 1969). The Appellants in this case did neither. The Appellants' Response opposing United Bank's Motion for Summary Judgment argued

the merits of the case, attaching several exhibits, including photographs and maps. Vol. III, R. 335-50. None of the "evidence" contradicted or disputed the unambiguous language of the contracts. The Response did not identify any specific discovery that should be completed or how discovery might impact the interpretation of the contracts. The Appellants' conjecture that discovery would further develop the court's understanding does not satisfy the requirements of CR 56.06, which states:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Kentucky's courts have repeatedly held that a party has a duty to provide an affidavit if they cannot produce contradictory evidence because further discovery is needed. See, e.g., Hayes v. Rodgers, 447 S.W.2d 597, 601 (Ky. 1969); Neal v. Welker, 426 S.W.2d 476, 479-80 (Ky. 1968).

The Kentucky Court of Appeals in Henninger v. Brewster, 357 S.W.3d 920 (Ky. App. 2012) recently reaffirmed the importance of complying with CR 56.06. In upholding summary judgment, the court held that:

> The Henningers "conclusions and conjectures" concerning what evidence additional discovery might produce are not sufficient to sustain their burden imposed upon them by Brewster's affidavit supporting her motion for summary judgment. To that end, the Henningers' argument fails because "[c]onclusory allegations based on suspicion and conjecture" are not sufficient to create an issue of fact to defeat summary judgment.

Id. at 929 (internal citations omitted). As in Henninger, the Appellants' Response to the Motion for Summary Judgment is insufficient to defeat summary judgment.

## CONCLUSION

The contracts executed among the parties demonstrate that summary judgment was proper and the Appellants' CR 60.02 Motion was appropriately denied. Extrinsic evidence, irrelevant regulations, and further discovery cannot compel a different outcome. For the foregoing reasons, United Bank respectfully requests that this Court affirm the Court of Appeals' and Scott Circuit Court's decisions in all respects.

Respectfully submitted,

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